Supreme Court, U.S.
FILED
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No. 94-2056

IN THE
Supreme Court of the United States
October Term, 1995

ROBERT W. KEARNS,
Petitioner,

v.

TOYOTA MOTOR COMPANY, LTD. ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF ON BEHALF OF UNITED TECHNOLOGIES CORP. AND UNITED TECHNOLOGIES AUTOMOTIVE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

United Technologies Automotive, Inc. is wholly owned indirectly by United Technologies Corp.

United Technologies Corp. and United Technologies Automotive, Inc. have the following direct or indirect subsidiaries:

United Technologies Automotive Holdings, Inc.
Carrier Corporation
Otis Elevator Company
Otis Europe S.A.
Pratt & Whitney Canada Inc.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents United Technologies Corporation and United Technologies Automotive, Inc. (collectively "United Technologies") hereby oppose the Petition for Writ of Certiorari filed by Robert W. Kearns ("Kearns") in this case.

STATEMENT OF THE CASE

Kearns' Petition for Writ of Certiorari improperly confuses the dismissal below of his patent infringement action against United Technologies with the dismissal of his many consoli-

dated patent infringement actions against others, involving 43 named defendants and five separate appeals. The circumstances of the bringing and dismissing of the one are distinct and different from those of the others.

Kearns' cries in his Petition of unfairness and injustice to a *pro se* plaintiff, which he asserts to have arisen in those other case dismissals, are inapplicable to the proper procedural actions taken by both the United States District Court for the Eastern District of Michigan ("district court") and the United States Court of Appeals for the Federal Circuit ("court of appeals") in his litigation against United Technologies.

The district court exercised the inherent discretionary power of trial docket management, and dismissed the action of a plaintiff who refused, as in his other cases, to fairly and responsively prosecute his case. The court of appeals exercised the inherent power of appellate docket management, under both the Federal Rules and its own rules of procedure, and dismissed the appeal of an appellant who failed to file a timely main brief in support of his appeal. Those dismissals were in no way related to any motions for reconsideration and extension of time before the district court, or to the timely perfecting of an appeal before the court of appeals. Kearns' case against United Technologies expired with his failure to pursue his appeal or to seek any prior extension of time or subsequent relief for his failure.

Kearns' brief in support of his Petition fails to offer any summary description of the proceedings involving United Technologies before the district court and the court of appeals below. Kearns does not ask this court to review the appropriateness of either the district court's discretionary dismissal of his patent infringement action or the appeals court's dismissal of his appeal. Instead, Kearns' brief in support of his Petition complains of the uncertainty in the law regarding the filing of motions for extensions of time in which to file a motion for

reconsideration, when no such motion was filed in his district court action against United Technologies. Kearns further complains about being denied his right to appeal when, in fact, he timely filed his notice of appeal from the district court as to United Technologies. Finally, Kearns complains of the complexity of the patent infringement lawsuits brought by him and of being "forced to proceed on them *pro se*" when, in fact, Kearns voluntarily chose to file his complaint against United Technologies and to proceed *pro se* in that action, despite the strong urging by the district court that he seek counsel, and despite the ready and willing availability to him of counsel who had successfully served him in prior litigation on the same patent subject matter.

On July 8, 1992, Kearns filed an amended complaint against United Technologies with the United States District Court for the Eastern District of Michigan alleging infringement of patents relating to intermittent windshield wiper ("IWW") modules. Kearns' action against United Technologies is but one of many patent infringement actions related to IWW technology filed by him in the Eastern District of Michigan.[1] All of Kearns' many patent infringement actions in that district have been continuously managed by Judge Avern Cohn. Judge Cohn pre-

[1] Since 1978, Kearns has filed the following numerous patent infringement suits against the automobile industry and related parties in the United States District Court, Eastern District of Michigan, Southern Division in Detroit: *Kearns* v. *Wood Motors, Inc., Daimler-Benz Aktiengesellschaft, and Dr. Ing. h.c.f Porsche A.G.* (78-CV-70642); *Kearns* v. *Ford Motor Co.* (78-CV-7040); *Kearns* v. *Chrysler Corp.* (82-CV-70748); *Kearns* v. *Fred Lavery Porsche, Volkswagen Werke A.G. Solfsburg, and Audi NSU Auto Union, A.G.* (82-CV-70749); *Kearns* v. *American Motors Corp.* (85-CV-70460); *Kearns* v. *General Motors Corp.* (85-CV-70461); *Kearns* v. *Ferrari S.p.A., AB-Volvo, Alfa Romeo S.p.A., Automobile-Citroen, S.A., Bayerische Motoren Werks, A.G., B-L, PLC (British Leland), Fuji Heavy Industries, Ltd., Group Lotus Cars Co., Honda Motor Co., Isuzu Motor Co., Ltd., Mitsubishi Motors Corp., Nissan Motor Co., Ltd., Officiene Alfiere Maserati, Peugot, S.A., Regie Nationale Renault, Rolls Royce Motors, Ltd., Saab-Scania AB, Toyo Kogyo Co., Ltd. (Mazda), Toyota Motor Co., Ltd. and 11 Detroit area auto dealerships* (85-CV-70459); and *Kearns* v. *United Technologies Corp. et al* (92-CV-71408).

sided over two prior jury liability trials and three damages trials of Kearns' patents.

Judge Cohn has first-hand experience over many years in dealing with both Kearns as a named plaintiff and Kearns as a *pro se* litigant. Kearns has adamantly refused to engage counsel to assist him with the lower court action against United Technologies.[2] In each of Kearns' other patent infringement cases, Kearns repeatedly and wilfully refused to prosecute and/or comply with the reasonable pretrial management orders of the court. As a result, all of Kearns' remaining related patent infringement actions, with the exception of this action, were finally dismissed with prejudice by the district court below for reasons of Kearns' own creation and misconduct.

In the present action, Kearns provided no indication to the court below that he had the capability to prosecute that action and to bring it to trial without severely prejudicing United Technologies in the preparation of their defenses. In fact, Kearns provided to the court every indication of the very same unwillingness to prosecute his case except on his own terms

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[2] THE COURT: And Dr. Kearns, I take it your position is the same in United Technologies as it has been in the past, under no set of circumstances will you employ a lawyer?

DR. KEARNS: I think I would like the record to show that I have been constrained in my ability to employ a lawyer.

THE COURT: Oh, no. Oh, no, you haven't been constrained. You will not engage counsel to prosecute these cases. You insist on prosecuting them *pro se*? Is that a fair statement?

DR. KEARNS: Well, I think the fair statement is, as I stated on the record the last time I was here, that you have allowed me 90 days to get new counsel. I went to the West Coast, I went to the Mid-West, I went to the East Coast, I interviewed 13 law firms.

THE COURT: Arnold, White & Durkee, so we'll be clear, is prepared to represent you at any — was prepared —

DR. KEARNS: I would never in my life, if you cut off both arms, I wouldn't have Arnold, White & Durkee represent me, your Honor, because they're not of professional sature to represent Dr. Kearns.

THE COURT: All right.

Hearing Transcript dated March 28, 1994, pp. 6-7.

and at his own sole convenience. This was repeatedly demonstrated before the district court in his other pending actions. The district court, in those actions, was wholly frustrated in the exercise of its judicial power to require Kearns to fairly prosecute and reasonably bring those actions to trial and final resolution. The district court, in those actions, was ultimately left with no effective alternative to compel compliance and obedience by Kearns but to dismiss those cases. The district court, having carefully considered Kearns' conduct in his prior patent infringement actions, the similarity of issues to be tried in this action, and the refusal by Kearns to respond to the summary judgment motions of United Technologies, was again left with no reasonable alternative but to dismiss the case in accordance with discretionary power to manage the court's trial docket (S.A. 3-5).[3] Kearns sought reconsideration of that dismissal by motion, which was dismissed by the district court as meritless (S.A. 2).

Upon Kearns' appeal from that dismissal, the court of appeals dismissed Kearns' appeal for failure to prosecute and to file a brief in support of his appeal as expressly required by Federal Circuit Rule 31 within the time permitted by the court of appeals (S.A. 1). Kearns did not seek reconsideration of that dismissal as allowed under Federal Circuit Rule 45(a), or otherwise seek relief from the court of appeals.

SUMMARY OF THE ARGUMENT

Kearns has failed to identify either specifically or by reasonable inference, any question which would justify grant of his

[3] Where, as here, the Court is offered an inadequate Appendix, it is permissible for the Respondent, under Sup. Ct. R. 15, to include with its Opposition a supplemental appendix containing material permitted by Sup. Ct. R. 14 for the convenience of the Court. United Technologies identifies references to its Supplemental Appendix as "S.A."

Petition and review of the decisions below in his patent infringement action against United Technologies. No conflicting appeals court rulings can be identified. No departure from accepted and usual judicial proceedings can be shown to have taken place. No unsettled federal law can be defined.

In his Petition, Kearns seeks review by this Court of events which simply did not occur in his action against United Technologies. The district court dismissed Kearns' patent infringement suit against United Technologies due to a demonstrated unwillingness by Kearns to prosecute that case. The court of appeals dismissed Kearns' appeal of that decision for failure to prosecute, since Kearns did not file his appeal brief within the time limit set by the court.

The questions presented by Kearns to this Court for review do not dispute or even address the correctness of the lower court decision to dismiss his action against United Technologies. Instead, Kearns' questions presented are directed to the timeliness of his motion for reconsideration filed in his many other patent infringement actions, but not in his suit against United Technologies. Kearns, therefore, improperly seeks to entrain his United Technologies case before this Court along with his many other patent infringement cases without identifying any record basis worthy of review by this Court.

Accordingly, Kearns' Petition for Writ of Certiorari should be denied by this Court as failing to raise any question which would justify grant of the Petition as to United Technologies.

REASONS FOR DENYING THE PETITION

I. The Questions Presented By Kearns Do Not Address Any Issues Of The Lower Court Proceedings Involving United Technologies.

Kearns has not stated any issue involving United Technologies "worthy of this Court's time". (Petition p. 9) In dismissing

Kearns' district court action, the district court referenced a clear pattern of delay and contumacious conduct exhibited by Kearns in his other patent infringement suits pending there. Kearns was specifically cited by the district court for failure to act reasonably with regard to discovery matters, for the confusion exhibited in his papers and oral presentations to the court, for his inability to focus, for his inability to understand the rules of law, and for his failure to follow the court's orders. Kearns disregarded and submitted no response to United Technologies' long-pending motions for summary judgment. The district court concluded, therefore, that Kearns lacked the ability to adequately manage the pretrial matters remaining in his action against United Technologies and, further, that Kearns lacked the ability to adequately represent himself in the trial of the case, all of which prejudiced United Technologies' ability to prepare a defense to the action. Kearns sought reconsideration of that dismissal by motion, which was dismissed by the district court as meritless.

Kearns provided no indication to the district court that he had the capability to prosecute that action and to bring it to trial without severely prejudicing United Technologies. In fact, Kearns provided to the district court every indication of the very same inability to prosecute his case as was demonstrated before the district court in his other pending actions. The district court, in those other actions, was unable to compel Kearns to fairly prosecute and bring those actions to trial. The district court, in those other actions, was left with no effective alternative but to dismiss those cases. The district court, having carefully considered Kearns' conduct in his prior patent infringement actions and the similarity of the issues to be tried in the United Technologies action, was again left with no effective alternative but to dismiss that action, too, in accordance with the discretionary power of the district court to manage the trial court docket.

Kearns then, as to the United Technologies dismissal, timely filed his notice of appeal with the Court of Appeals for the Federal Circuit, only to have that court, thereafter, dismiss his appeal for failure to prosecute by timely briefing in accordance with the rules. Kearns was granted extensions of time by the court of appeals within which to file his main brief and was instructed by the court of appeals that no further extensions should be anticipated by him. Kearns ultimately failed to do so, leaving the court of appeals with no other appropriate management choice but to dismiss the appeal. In response, Kearns did not seek reconsideration of that dismissal, nor even offer any good faith explanation as to why he did not or could not timely file his main brief. Rather, Kearns now inappropriately and belatedly seeks review by this Court of the court of appeals' previously unchallenged management of his appeal.

Having failed to prosecute his appeal in a proper and timely manner, it is an abuse of the Petition procedure to now come before this Court and seek review of questions which are irrelevant to the lower court proceedings involving United Technologies and which were neither presented to nor reviewed by the court of appeals below.

II. Kearns Has Failed To Identify A Question Subject To Review Under Supreme Court Rule 10.

None of Kearns' questions presented, nor his Petition in general, meets the standard of Sup. Ct. R. 10. The court of appeals dismissed Kearns' appeal as to United Technologies for failure to prosecute in accordance with that court's rules. In seeking review as to United Technologies, Kearns has cited no appeals court precedent which conflicts with the court of appeals' dismissal on procedural grounds, nor has Kearns demonstrated that the court of appeals' dismissal "so far departed from the accepted and usual course of judicial proceedings" so

as to require this Court's supervision. The court of appeals properly dismissed Kearns' appeal when Kearns failed to file his main brief within the time set by the court's rules or to seek yet a further extension of time, for good cause, within which to do so.

In dismissing the appeal, the court of appeals did not decide any question of federal law which is either unsettled or conflicts with applicable decisions of this Court. No basis for the questions now sought to be raised here as to United Technologies was presented to the court of appeals. Both the court of appeals and the district court acted in full accord with *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962) ("the authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.") and *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that 'certain implied powers must necessarily result to our Courts of justice from the nature of their institution', power 'which cannot be dispensed within a Court, because they are necessary to the exercise of all others'."). This Court need not revisit the appropriate management decisions of either the district court or court of appeals, which were uniquely judicially qualified to weigh the specific circumstances of Kearns' conduct and to act to dismiss his action against United Technologies. *See National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951).

CONCLUSION

Kearns' Petition for Writ of Certiorari fails to identify any question which would justify grant of the Petition and review of the lower court decisions. Accordingly, Kearns' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(617) 345-9100

Counsel for Respondents, United Technologies Corp., and United Technologies Automotive, Inc.

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1310

ROBERT W. KEARNS,
Plaintiff-Appellant,

v.

UNITED TECHNOLOGIES CORP., AND
UNITED TECHNOLOGIES AUTOMOTIVE, INC.,
Defendant-Appellee.

ORDER

The appellant having failed to file the brief required by Federal Circuit Rule 31.(a) within the time permitted by the rules, it is

ORDERED that the notice of appeal be, and the same hereby is, DISMISSED, for failure to prosecute in accordance with the rules.

March 31, 1995

FOR THE COURT,
FRANCIS X. GINDHART
Clerk

cc: Clerk's Office, DCT
ROBERT W. KEARNS
PETER MCDERMOTT
BERNARD CANTOR

ISSUED AS A MANDATE: March 31, 1995

FILED
U.S. Court of Appeals For
The Federal Circuit
March 31, 1995
Francis X. Gindhart
Clerk

KEARNS V. UNITED TECHNOLOGIES, 94-1310
(DCT - 92-71408)
NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

S.A. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,
v.

Civil No. 92-71408

UNITED TECHNOLOGIES CORPORATION AND UNITED TECHNOLOGIES AUTOMOTIVE, INCORPORATED,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

On March 30, 1994 an order was entered dismissing this case. Plaintiff has moved for reconsideration. There is no merit in the motion. The motion is DENIED.

SO ORDERED.

AVERN COHN
UNITED STATES
DISTRICT JUDGE

DATED: APR 20 1994
Detroit, Michigan

A TRUE COPY
CLERK, U.S. DISTRICT
COURT, EASTERN
DISTRICT OF MICHIGAN

By Judy Cassady
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,
v.

HON. AVERN COHN

UNITED TECHNOLOGIES CORPORATION AND UNITED TECHNOLOGIES AUTOMOTIVE, INCORPORATED,
Defendants.

Civil Action No. 92-CV-71408

ORDER

The Court having reviewed the papers filed in connection with defendants' Motion to Dismiss in this action, considered arguments on the motion at the hearing on March 28, 1994, and having reviewed the papers filed in connection with defendants' Motion to Dismiss in *Kearns* v. *Ferrari, et al.*, Civil Action No. 85-70459, the Special Master's report filed in response to Pretrial Order No. 10 in that case, and the letters of defense counsel filed in response thereto, and having held a hearing in Civil Action No. 85-70459 on defendant's Motion to Dismiss and the Special Master's report on January 26, 1994;

The Court being satisfied that, after giving full consideration to the record in this case, other related pending and stayed actions, including *Kearns* v. *Ferrari, et al.*, Civil Action No. 85-70459, as well as the records in the related Chrysler and General Motors cases, the Special Master's report in Civil Action No. 85-70459 and the letters from counsel for defendants in response to the Special Master's report, plaintiff lacks

the ability to adequately manage the pretrial matters remaining in this case and also lacks the ability to adequately represent himself in the trial of this case, and the plaintiff having failed to retain counsel in this case and having categorically refused to retain counsel with authority to manage the related cases in a manner that would be appropriate, proper and prudent;

The Court having taken note of the manner in which plaintiff has responded to the discovery matters outstanding in Civil Action No. 85-70459 and the manner in which he has responded at the aforesaid January 26, 1994 hearing to Pretrial Order No. 10, as well as plaintiff's failure to act reasonably with regard to discovery matters, the confusion exhibited in his papers and in his oral presentations to the Court, his inability to focus, his inability to understand the rules of law, his failure to follow the Court's orders, his failure to comply with discovery orders, such that in the Court's view that case will never get to trial, and if it did, plaintiff would be unable to present a case; all of which prejudices defendants in that case by subjecting them to inordinate expense in attempting to secure discovery, be depriving them of discovery to which they are entitled; and by making it impossible for them to prepare for trial;

The Court having concluded that this case will inevitably present the same issues and problems arising from plaintiff's failure to obey orders of the Court and Federal Rules of Civil Procedure, and to retain counsel; and, ultimately, that plaintiff will be unable to properly prepare this case for trial or to conduct trial, all of which inures to the prejudice of defendants' ability to prepare their defense of the action;

NOW, THEREFORE, for the foregoing reasons, the reasons stated on the record at the aforesaid March 28, 1994 hearing in this action, the January 26, 1994 hearing in Civil Action No. 85-70459, the reasons set forth in Defendants' Motion to Dismiss, and papers filed in Civil Action No. 85-70459, includ-

ing Defendants, Motion to Dismiss, the Supplemental Memorandum in Support of Defendants' Motion to Dismiss, the Special Master's report and the letters from counsel in response thereto, it is hereby ORDERED that:

The above-captioned case and plaintiff's claims against each of the defendants in the above-captioned case is hereby dismissed with prejudice.

Dated: March 30, 1994

AVERN COHN
United States District Judge

A TRUE COPY
CLERK, U.S. DISTRICT
COURT, EASTERN DISTRICT
OF MICHIGAN
By Judy Cassady
DEPUTY CLERK